



Matthew G. Bevin
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Kentucky Labor Cabinet
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David A. Dickerson
Secretary

April 24, 2019

VIA HAND DELIVERY

Hon. Andy Beshear
Attorney General
Commonwealth of Kentucky
Capitol Building, Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601

Re: Request to Withdraw Subpoenas

Dear Attorney General Beshear:

I am in receipt of your letter dated April 16, 2019, in which you asked that I withdraw the subpoenas recently served by the Labor Cabinet's Office of Inspector General (OIG) on 10 Kentucky school districts. Although I appreciate your letter, I see no valid reason to overlook possible violations of Kentucky law.

Last week, you incorrectly stated that the Labor Cabinet is "trying to subpoena and fine [teachers] \$1,000 apiece." As you should know, this office is only beginning an investigation and has made no decision whether any statutory violation has occurred. At this early stage, we are simply gathering information about possible violations of Kentucky law. Nothing more. Permit me to explain.

First, you speak of *duty* as a privilege that is unique to *your* office. Like you, I am the leader of an Executive Branch agency. Thus, I, too, have certain duties under Kentucky law. KRS 336.050(2) authorizes my office to "prosecute any violation of any of the provisions of any law which it is [my] duty to administer or enforce." This includes violations of KRS Chapter 336. In furtherance of this mandate, KRS 336.060(1) allows that "[i]n the conduct of an investigation or hearing, [my office] or any authorized deputy may issue subpoenas to compel the attendance of witnesses and parties and the production of books, papers, and records competent and relevant to the matter under investigation." As the chief law officer of the Commonwealth, your primary *duty* should be in seeing that these laws are followed, not impeded.

Because you have raised the issue, the public has a right to understand the reason why the Labor Cabinet OIG issued the subpoenas you oppose. KRS 336.130(1) plainly states: “Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, except that no *public* employee, collectively or individually, may engage in a strike or a work stoppage.” (emphasis added). In other words, the General Assembly has made it unlawful for *public*-sector employees to engage in work stoppages. You, of all people, should honor and respect that law.

Kentucky is not unique in its prohibition of public-sector strikes and work stoppages. The State of Michigan, which you identify in your letter, likewise prohibits strikes by public employees.¹ Federal law also prohibits federal-government employees from “participat[ing] in a strike, or assert[ing] the right to strike, against the Government of the United States.”²

The rationale for such prohibitions is obvious. In the private sector, a strike or work stoppage results in the deprivation of a product or service. A lumber yard, where I spent more than three decades of my life, cannot produce wood products when a work stoppage occurs. A steel mill cannot make rebar. A restaurant cannot offer food. But in the public sector, a strike or work stoppage means the deprivation of *critical* government services to the injury of the public at large. Streets are not policed. 9-1-1 calls are left unanswered. Children—the ultimate beneficiaries of the service of public education—are not educated.

Consequently, under Kentucky law, I have a duty to (1) investigate whether a public-sector strike or work stoppage has occurred in violation of clear Kentucky law, and (2) determine how best to hold people accountable in the event a finding is made that they have intentionally deprived the public—*i.e., our children*—of the service they are due. It matters not that the school districts themselves have determined not to raise the issue; Kentucky law compels *me* to act.

There are also moral and ethical considerations in play. Many Kentuckians have expressed their frustration with the so-called “sick outs” that the Labor Cabinet OIG is investigating. Working parents have had to scramble for expensive childcare on short notice, or potentially jeopardize their jobs. Some parents are concerned that their children are going to miss summer camp. Others have been forced to cancel pre-scheduled vacations. In Louisville, students have had to postpone taking the ACT—a requirement for admission to college—and parents have expressed their concern that the significant investment they made in ACT prep courses for their children has gone to waste. This is on top of the countless accommodations parents and students had to make in 2018 for similar actions by public-school employees during the debate over pension reform.

Yet, despite all of these inconveniences and injuries to the public, it appears that your only answer is that public-school employees enjoy a right to speak out under the First Amendment. No one disputes the existence of that right. But that is not what is at stake here. What is at stake here is whether public-school employees can *lie* about being sick and force a shutdown of the entire school system so that they can get *paid* while coming to Frankfort to lobby. That you would

¹ See Mich. Comp. Laws § 423.202.

² 5 U.S.C. § 7311(3).

discard so easily the interests of the many parents and children who rely on the regular workings of the public-school system in favor of a small but vocal group who would shut down that system altogether because they oppose certain legislative proposals is an audacious position at best.

If you think that the public employees who participated in the “sick outs” truly believed they were acting free of any possible consequence, you are misinformed. For example, according to news reports, the Kentucky Education Association issued a legal opinion earlier this year informing public-school employees that they could face disciplinary action even if their school districts closed due to teacher shortages.³ The then-President of the Kentucky Education Association, Stephanie Winkler, was quoted as saying: “Everyone obviously knows when they call in for any kind of leave day, but especially a sick day, that they are required to sign an affidavit, and if you violate that affidavit there are consequences. . . . That’s always been the case, and there’s been plenty of cases before that have had that discipline applied.”

My interest and duty, first and foremost, is upholding and enforcing Kentucky law. As Attorney General, that should be your primary duty as well. Although you have apparently determined the motivation of each person who participated in “sick outs” without investigation, I choose not to make final determinations without looking at the evidence. That is why I tasked the Labor Cabinet’s OIG with the job of gathering information and putting together a report so that I will be fully educated to decide whether sufficient evidence exists to issue citations against any public employee pursuant to KRS 336.985 and 336.990. It may be that, when all is said and done, this office issues some citations. It may be that this office issues no citations at all. We won’t know until after an inquiry is completed and we review all the evidence.

For the record, however, I have had no direct involvement in the Labor Cabinet OIG’s inquiry other than the initial referral. With nearly three decades of investigative experience, including time as the First Assistant Deputy Inspector General for the State of Ohio, the Labor Cabinet’s Inspector General, Rodney Stewart, runs an office in which integrity, professionalism, and independence are paramount. I am confident that he will be fair and impartial throughout this process. You should have that same confidence.

With that background in mind, let’s talk about what we know to have occurred thus far. Consistent with its usual protocols, and as reported by you and the media, the Labor Cabinet’s OIG issued subpoenas to 10 Kentucky school districts and asked for the production of the following:

Any and all documents related to alleged “sick outs” by employees of [the school district] occurring on or about February 28, and March 5, 6, 7, 12, 13, and 14, of 2019, including, but not limited to, the following records:

³ Kevin Wheatley, *Even With Closures, Teachers Who Call Out Sick Could Face Discipline, KEA Says in Legal Opinion*, WDRB.com (Mar. 13, 2019), https://www.wdrb.com/in-depth/even-with-closures-teachers-who-call-out-sick-could-face/article_fdb54fdc-45b8-11e9-b163-03b314265f83.html.

- (1) *Copies of all documents and/or records identifying the names of any [school district] employees who called in sick to [the school district] for any of the dates identified above*
- (2) *Copies of all documents and/or records that memorialize or record any attempt made by the [school district] employees identified above to call in sick to [the school district] for any of the dates identified above;*
- (3) *Copies of all affidavits from [school district] employees or letters/notes from licensed medical professionals provided by [school district] employees who called in sick to [the school district] for any of the dates identified above that authenticate or confirm the reason for the employees' requested absence;*
- (4) *Copies of all documents and/or records maintained by [the school district] that discuss the decision by [school district] officials to close schools for any of the dates identified above due to an alleged "sick out";*
- (5) *Copies of all policies and procedures concerning the use of sick leave by [school district] employees, the method by which [school district] employees must notify [the school district] of the need to take sick leave, and the need to provide supporting documentation, if any, upon the employees' return to work; and*
- (6) *A certification of any records provided.*

The subpoenas themselves also provide each school district with 30 days to produce the information to the Labor Cabinet's OIG. To date, that is all anyone associated with the Labor Cabinet has done or asked to be done. Moreover, no school district has publicly objected to complying with the subpoenas.

This brings me back to your letter and your public comments. You mention that, if the Cabinet persists, "thousands of dollars of legal fees" will be wasted. To be clear, the only "wasted" resources will be those needlessly expended by your office in pursuing, and by mine in defending, any meritless and premature effort by your office to obstruct the lawful inquiry undertaken by the Labor Cabinet's OIG. That is a road that does not have to be taken. You, of all people, as chief law officer of the Commonwealth, should let this statutorily authorized investigation proceed as the law provides.

Make no mistake, I will do my legal duty for all the people of the Commonwealth. What I will not do is set aside my obligations to uphold well-established Kentucky law because it might not sit well with you.

Sincerely,



David A. Dickerson
Secretary
Kentucky Labor Cabinet

cc: Governor Matthew G. Bevin